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CASE NO. 85-695

IN THE

Supreme Court Of The United States

1985 TERM

ILLINOIS CENTRAL GULF RAILROAD COMPANY
Defendant-Petitioner

v.

EVAN D. COLEMAN
Plaintiff-Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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SUMMARY OF ARGUMENT

The Petition for Certiorari before this Court is due to be denied because petitioner did not raise the question presented in the petition in state court. In state court petitioner challenged only the procedural propriety of applying Section 12-22-72 of the Code of Alabama (1975)[1] to the judgment against petitioner, while denying petitioner's request for oral argument as a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[2] In this Court petitioner attempts to raise the substantive invalidity of § 12-22-72 under the Equal Protection Clause of the Fourteenth

[1]Hereinafter referred to as "§ 12-22-72" or "the statute".

[2]Hereinafter referred to as "Due Process or "Due Process Clause". All references to "Fourteenth Amendment" refer to the Constitution of the United States.

Amendment.[3] Because petitioner has not previously raised the question it seeks to present to this Court, petitioner fails to satisfy the "not pressed or passed upon below" rule. Therefore, the Petition for Certiorari should be denied.

Further, the petition fails to raise a substantial federal question. Petitioner asserts that the application of § 12-22-72 is discriminatory because it applies only to defendants. Contrary to petitioner's assertion, § 12-22-72 applies to any person against whom a money judgment is rendered, who files a supersedeas bond to avoid paying the judgment while on appeal, and against whom judgment is affirmed without change, whether that person is a plaintiff or a defendant. Indeed, § 12-22-72 applies to the same class of persons who must pay post-judgment interest. Petitioner fails to note the obviously legitimate objective of the statute, which is to compensate persons who must await payment of a judgment already proved and won until the completion of an appeal that affirms the judgment without change. The means of achieving the state's objective, adding ten percent damages to a judgment affirmed without change, is rationally related to its objective since application of the statute depends upon a finding that the appellee's entitlement to judgment was without error. The statute is reasonably tailored to achieve the objective in that the amount of the damages varies with the amount of the judgment, the use and benefit of which the appellee is unjustly denied. In essence, § 12-22-72 is nothing more than additional post-judgment interest at a fixed rate for a statutory time period of one year. Alternatively, it might be considered a statutory "origination fee" charged for borrowing appellee's money while on appeal. Whichever view is accepted, the statute is a carefully tailored means of achieving the legitimate objective of the state, which is to compensate appellees in appropriate circumstances for the loss of the use and benefit of money owed to the appellees.

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[3]Hereinafter referred to as "Equal Protection" or "Equal Protection Clause".

ARGUMENT

I

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED BY PETITIONER WAS NEITHER PRESSED NOR PASSED UPON IN STATE COURT

A. Petitioner Raises a Separate Federal Question in this Court not Presented to the State Court.

Title 28 Section 1257 of the United States Code requires that a federally created right, title or immunity must be "set up or claimed" by petitioner for certiorari jurisdiction of this Court to exist. This Court has held that a claim must have been "either raised or squarely considered and resolved in state court," or, stated differently, "pressed or passed upon in the courts below" in order to be heard by this Court.[4] *Illinois v. Gates,* 462 U.S. 213, 218 n.1 (1983); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434-35 (1940). Petitioner's sole challenge to § 12-22-72 in state court was in petitioner's application for rehearing and supporting brief to the Alabama Supreme Court. Petitioner argued below that application of § 12-22-72 without allowing oral argument on petitioner's appeal violated petitioner's right of Due Process under the Fourteenth Amendment.[5]

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[4]Although this Court has questioned whether the "not pressed or passed upon below" rule is jurisdictional, *Illinois v. Gates,* 462 U.S. 213, 222 (1983), and although respondent asserts that the rule is jurisdictional, weighty prudential considerations indicate that this Court should deny the petition *sub judice.* See the discussion *infra* at 6-7.

[5]In petitioner's Application for Rehearing and Supporting brief, petitioner stated:

> Finally, ICG states that the assertion of a ten percent penalty with respect to an adverse judgment of $500,000 without the opportunity or grant of requested oral argument is a denial of due process under the Constitution of the State of Alabama and the Fourteenth Amendment to the Constitution of the United States. Application of § 12-22-72 (Ala. 1975) in these circumstances contravenes the Constitution of the State of Alabama and the Constitution of the United States.

Application at 8.

In its petition to this Court petitioner also raises only one question: whether the operation of § 12-22-72 violates petitioner's rights to Equal Protection under the Fourteenth Amendment. *See* Petition for Cert. at 4-5.

The question presented by petitioner to the Alabama Supreme Court and the question presented in the petition *sub judice* are separate and distinct federal questions both facially and substantively. Petitioner's claim in the state court was under the Due Process Clause while petitioner's claim in this Court is under the Equal Protection Clause. Although the Equal Protection Clause and the Due Process Clause are both co· tained in the Fourteenth Amendment, each provides separate identifiable rights and privileges and each depends upon different principles for its application. This is demonstrated by the different nature of the two questions raised. Petitioner's claim in state court attacked the *procedural propriety* of applying § 12-22-72 to a judgment while denying petitioner the opportunity to orally argue its appeal. In this Court petitioner attacks the *substantive validity* of the statute as applied generally.

In *Dewey v. Des Moines,* 173 U.S. 193 (1899), this Court distinguished questions similar to those raised by petitioner below and in this Court. In *Dewey,* a city levied improvement assessments against the owner of property abutting a street paved by the city. A state trial court ordered the property forfeited when the assessments were not paid, and held the owner personally liable for the amount by which the assessments exceeded the value of the lot. In state court the owner argued that the imposition of personal liability against him violated the Due Process Clause because he had not received personal notice of the assessment proceedings. In this Court, the owner also attempted to argue that the assessment itself constituted a taking in violation of the Fourteenth Amendment. The Court held that, beyond arising from a single factual occurrence, the two claims

> are not in anywise necessarily connected . . . . The assessment upon the lots might be valid, while the provision

> for personal judgment might be void, each depending upon different principles; and the question as to the invalidity of the personal judgment might, as in this case, be raised and argued without in any manner touching the question as to the invalidity of the assessment upon the lots.

Dewey v. Des Moines, 173 U.S. at 198.

The *Dewey* Court further stated: "If the question were only an enlargement of the one in the assignment of errors, or if it were so connected with it in substance as to form but another ground for alleging the invalidity of the [state court's] judgment," *Id.* at 197-98, the Court would allow the question to be raised for the first time in this Court. However, the Court held the substantive validity of the assessment presented a separate federal question from the question presented by the procedural irregularity of lack of notice and declined jurisdiction of the substantive issue presented for the first time in this Court. *Id.* at 198, 200-201.

Likewise, in *Illinois v. Gates,* 462 U.S. 213 (1983), this Court distinguished the procedural nature of the exclusionary rule from substantive Fourth Amendment claims, *id.* at 223-24, holding:

> Because of this distinction, we cannot say that modification or abolition of the exclusionary rule is "so connected with [the substantive Fourth Amendment right at issue] as to form but another ground or reason for alleging the invalidity" of the judgment. . . . Rather, the rule's modification was, for purposes of the "not pressed or passed upon below" rule, a separate claim that had to be specifically presented to the state courts.

Id. at 224 (citations omitted).

The question presented in the petition *sub judice* forms a completely separate federal question from the question presented by petitioner to the state court. Petitioner's challenge below raised a narrow procedural question relying on a different constitutional provision and different principles from the broad substantive question raised by petitioner in this Court. The Due Process issue of applying § 12-22-72 without

allowing oral argument on the appeal could have been raised and argued without in any way considering the validity of the statute under the Equal Protection Clause. Therefore, the statute's validity under the Equal Protection Clause constitutes a separate claim that had to be specifically presented to the state courts. The Petition for Certiorari, therefore, should be denied for the same reasons certiorari was denied in *Dewey v. Des Moines, supra,* and in *Illinois v. Gates, supra.*

B. This Court Should not Grant the Requested Writ for Prudential as well as Jurisdictional Reasons.

Respondent asserts that the "not pressed or passed upon below" rule is jurisdictional. *See Hill v. California,* 401 U.S. 797, 805-806 (1971); *State Farm Mutual Automobile Ins. Co. v. Duel,* 324 U.S. 134, 160 (1945); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434-35 (1940); *Dewey v. Des Moines,* 173 U.S. 193, 198 (1899); *but see, Terminiello v. Chicago,* 337 U.S. 1 (1949); *Vachon v. New Hampshire,* 414 U.S. 478 (1974); *see also Illinois v. Gates,* 462 U.S. at 217-20. Even if the rule is not jurisdictional, serious prudential considerations weigh against allowing petitioner to raise the constitutionality of § 12-22-72 under the Equal Protection Clause for the first time in this Court.

First, and most important, is the notion of "comity" or a proper respect for the functions of state judicial institutions. *Cf. Younger v. Harris,* 401 U.S. 37 (1971). As this Court stated in *McGoldrick v. Compagnie Generale Transatlantique, supra,* "due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there." 309 U.S. at 435. *Accord Illinois v. Gates,* 462 U.S. at 221. Because the Alabama Supreme Court was not given the opportunity to consider the question presented by the Petition for Certiorari, this Court should decline to consider the issue.

A second prudential concern is that since the question raised in this Court was not raised below "the record is very

likely to be inadequate . . . ." *Illinois v. Gates*, 462 U.S. at 221 (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969)). Indeed, in this case the record is bereft of any development of facts that might bear on the determination of the legal issue sought to be raised. More importantly, the Alabama courts have not construed the statute's purpose and rationale in light of recent decisions of this Court and were not given the opportunity to do so in this case. Hearing this question without allowing Alabama courts to rule on it will deprive Alabama courts of the opportunity to articulate adequate and independent state grounds in support of the statute's validity.

The final prudential consideration concerns the determination of an issue of great public importance and far reaching significance on an inadequately prepared record. The use of appellate damage provisions is widespread. *See, e.g.*, Or. Rev. Stat. § 19.160 (1981); Va. Code § 16.1-113 (1982) (amended 1984). A decision on this statute could effect an upheaval of the appellate process throughout the country. Because of the obviously legitimate state objective of the statute and the precisely tailored means employed to achieve that end, any ruling concerning the statute's validity will call into question all such statutes in all states. By adhering to this Court's customary limitations on its discretion it avoids framing "broad rules, seemingly sensible on one set of facts which may prove ill-considered in other circumstances." *Illinois v. Gates*, 462 U.S. at 224.

C. The State Court below did not "Pass Upon" any Federal Question.

The Alabama Supreme Court did not "pass upon" the question presented *sub judice* or even the question presented by petitioner in its application for rehearing to the state court. In its mandate, the Alabama Supreme Court applied § 12-22-72 routinely and without comment. *See* Appendix to Petition for Cert. at A-1. Petitioner's application for rehearing was overruled without opinion. *Id.* at A-9. Such action does not rise to the level of having "passed upon" the issue for the purposes

of this rule. As this Court stated in *Illinois v. Gates*, "the routine restatement and application of settled law by an appellate court [does] not satisfy the 'not pressed or passed upon below' rule." 462 U.S. at 222-23 (citing *Morrison v. Watson*, 154 U.S. 111 (1894)).

II

THE PETITION FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION

Petitioner alleges that § 12-22-72 violates the Equal Protection Clause of the Fourteenth Amendment. Section 12-22-72 increases the amount of a judgment by ten percent any time an appellant files a supersedeas bond to stay execution on a judgment rendered against it and the judgment is affirmed on appeal without change.

The criteria for application of the statute operate without regard to race, creed, religion or any other suspect classification. Because the statute does not impose an invidious classification, the statute will violate the Equal Protection Clause " 'only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective,' *McGowan v. Maryland*, 366 U.S. 420 (1961), or if the objective itself is beyond the State's power to achieve, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *NAACP v. Alabama*, 377 U.S. 288 (1964); *Douglas v. California*, 372 U.S. 353 (1963)." *Lindsey v. Normet*, 405 U.S. 56, 70 (1972). In short, state procedures must be upheld if they are rationally related to legitimate state interests, and states are allowed wide latitude in legislating on social and economic issues. *City of Cleburne v. Cleburne Living Center*, 473 U.S. ____, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985).

Although the statute has been characterized as imposing a ten percent "penalty" upon the affirmance of "frivolous" or "delay" appeals, *see Chapman v. Rivers Construction Co.*, 284 Ala. 633, 645, 227 So. 2d 403, 415 (1969); *Montgomery Light & Water Power Co. v. Thombs*, 204 Ala. 678, 684, 87 So. 205, 211 (1920), the real purpose of § 12-22-72 is to provide ad-

ditional compensation to appellee litigants who are deprived of the use and benefit of their money during an appeal, after having proved an entitlement to judgment at trial and establishing that entitlement, without change, on appeal. *See, City of Birmingham v. Bowen,* 254 Ala. 41, 47, 47 So. 2d 174, 180 (1950). Section 12-22-72 applies automatically when a monied judgment or decree that is stayed on appeal by bond is affirmed without change. *See Chapman v. Rivers Construction Co., supra.* Because of its mandatory nature, the statute imposes damages in cases in which appellants may not subjectively intend to appeal solely for delay purposes. Likewise, many appellants raise novel or substantial questions on appeal that clearly are not "frivolous" if that term is defined to mean "wholly without merit" as it is frequently defined in cases deciding whether to impose discretionary penalties for "frivolous" claims or appeals. *Cf., e.g., Hughes v. Rowe,* 449 U.S. 5, 14 (holding that to award attorney's fees, under 42 U.S.C. § 1988, against a plaintiff in a civil rights action, "[t]he plaintiff's action must be meritless in the sense that it is groundless or without foundation.").

Section 12-22-72, however, applies an objective test to define "frivolous" or "delay" appeal in order to effectuate the purpose of the statute. An appeal is subject to the statute if the only *effect* of the appeal is to delay payment of the judgment. Whether an appeal is "frivolous" is determined by its result and not by the questions or contentions raised in the appeal. If the judgment is modified on appeal, even if it is affirmed in form (as where an appellee is ordered to remit part of the judgment), the statute does not apply. *See Chapman v. Rivers Construction Co.,* 284 Ala. 633, 644-45, 227 So. 2d 403, 414-15 (1969); *Montgomery Light & Water Power Co. v. Thombs,* 204 Ala. 678, 684, 87 So. 205, 211 (1920).

Because of the objective standard imposed, the means of the statute are tailored precisely to achieve the state's objective of compensating appellees in appropriate circumstances. While the statute may have the salutary effect of discouraging meritless appeals or appeals intended only for delay, it obviously

includes cases not in either category, because the statute's purpose is not simply to discourage meritless appeals or those pursued solely for delay. Further, as the Court stated in *Williamson v. Lee Optical*, 348 U.S. 483 (1955):

> The law need not be in every respect, logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Id. at 487-88.

The statute is designed to award appellees a reasonable amount of compensation under appropriate circumstances. Because the statute awards a percentage of the judgment, the amount awarded as damages by the statute varies directly with the amount of money withheld from an appellee during appeal. In this respect § 12-22-72 is identical to post-judgment interest. Thus, the statute is no more than an additional ten percent post-judgment interest charge for a statutory period of one year. Alternatively, the statute might be considered a statutory "origination fee" for the loan of appellee's money, in the amount of the judgment, to appellant.

Compensation of appellees deprived of the use of funds during appeal is an objective well within the legitimate powers of a state. Indeed, this Court affirmed the validity of a ten percent damage statute similar to § 12-22-72 in *Louisville & Nashville Railroad v. Stewart*, 241 U.S. 261 (1916) stating:

> [T]he railroad company obtained a supersedeas, and the law of the state makes 10 per cent the cost of it to all persons if the judgment is affirmed. There was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld.

Id. at 263.

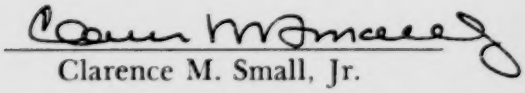
Because the objective of the statute is patently within the legitimate powers of the state, and because the means employed in the statute are tailored to award appellees a reasonable

amount only in appropriate circumstances, no substantial federal question is presented in the petition *sub judice*. Therefore, the Petition for Certiorari should be denied.

CONCLUSION

Because the Petition for Certiorari *sub judice* raises only one question which was neither pressed nor passed upon in the state court, and because the question presented is not a substantial federal question, the requested writ should be denied.

Respectfully submitted,



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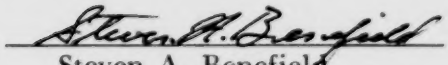

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CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari have been served on counsel for all parties to this action by mailing such copies postage prepaid to the following this 20th day of November 1985:

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